STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 3, 2003

TO PARTIES OF RECORD IN RULEMAKING 01-09-001 AND INVESTIGATION 01-09-002

On November 7, 2003, Decision 03-10-088, the final decision of the Commission in the above proceedings, was mailed to the parties without the dissent of Commissioner Loretta Lynch. The dissent is now available, and is enclosed herewith.

/s/ ANGELA K. MINKIN by KKH
ANGELA K. MINKIN
Chief, Administrative Law Judge

ANG/epg

Attachment

COMMISSIONER LYNCH, dissenting:

I. Introduction

The majority decision correctly reflects our charge in this phase of the case as set forth in the order opening this docket: "In Phase 2 of this proceeding, the Commission will assess how service quality has fared under NRF [the New Regulatory Framework]."[1] The purpose of this review, as we also explained in our order opening this docket, is to make findings that will assist our Phase 3 inquiry into "whether and how NRF should be revised to achieve the Commission's goal of high-quality service."[2] NRF has been in effect for Pacific Bell (Pacific) and Verizon since 1990. Consequently, to determine how service quality has fared under NRF, our task necessarily is to assess the service quality of Pacific and Verizon over the entirety of the NRF period.

Summarizing its findings, the majority decision states that "Verizon offers very good service quality" and that "Pacific offers generally good service quality in most areas, but there are several important areas of weakness in the quality of specific residential services."[3] Thus, the majority appears to conclude that, in most areas, Pacific has offered "generally good" service over the ten-plus year

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[1] Majority decision (Majority) at 9, citing Rulemaking (R.) 01-09-001, Appendix A.

[2] Majority at 9, citing Rulemaking (R.) 01-09-001, Appendix A.

[3] Majority at 1. .

NRF period and that Verizon's service has been "very good" over the NRF period.[4]

My disagreement with the majority decision hinges not on the data and information that are cited and examined, but on the conclusions drawn from that information. While I believe that some of the evidence points to solid performance by the utilities, particularly Verizon, the majority decision reaches conclusions that are too favorable to the utilities when judged against the full record. In assigning the utilities strong grades, the majority overlooks some serious shortcomings in the data upon which they rely and fails to accord sufficient weight to previously adjudicated findings of poor performance. The majority's leniency in grading the utilities' performance sends the unfortunate message that the utilities may continue with impunity their aggressive programs of job cuts that continue to threaten service quality.

[4] I use the word "appears" advisedly. It is puzzling that the majority decision frames its findings about the service quality of Pacific and Verizon in the present tense, as in the statement that "Pacific *offers* generally good service . . .." The use of the present tense raises the question of whether the majority viewed the charge of the commission to make findings about the *current* service quality of the two utilities. As shown by the language quoted above, this would be a serious misunderstanding of the task the Commission laid out for itself in this phase – to examine service quality over the entirety of the NRF period. It would also ignore the time period of the information in the record. A review of the graphs in the majority decision shows that the record contains GO 133-B and ARMIS data only through the year 2001. As a result, the record lacks the necessary data to make any well-informed findings about current service quality in 2003. Whether these summary conclusions about the service quality of Pacific and Verizon are meant to describe current conditions or to summarize the quality of service over the entire NRF period is an unfortunate ambiguity in the majority decision.

II. The Majority Decision Accords Insufficient Weight to the Adjudicated Decisions Finding Serious Problems With the Utilities' Service

The most glaring error in the majority decision is the insufficient weight it accords the numerous Commission decisions finding service quality deficiencies and violations over the NRF period – especially the eight cases that are critical of Pacific's service quality.[5] Collectively, those decisions assign over $100 million in penalties and reparations to Pacific. The majority decision downplays the significance of these decisions, characterizing them as "a mere eight enforcement proceedings spread out over more than a decade . . .."[6] However, here is what the Commission found in just some of those decisions:

- In 1993, the commission ordered Pacific to pay $50 million in fines and reparations because, *for five years,* it retained a botched payment processing system that charged millions of customers late payment charges when they paid their bills on time. Pacific knew it had a poor system but still did not correct the problem until a courageous Pacific employee blew the whistle to a San Diego newspaper.[7]
- In 1997, the Commission found that Pacific provided poor service for ISDN customers, because of insufficient staffing and poor record-keeping.[8]
- In 2001, the Commission fined Pacific $15 million for marketing abuses and poor service quality. The Commission found that

[5] Those cases are listed on pages 148 to 151 of the majority decision.

[6] Majority at 152.

[7] D.93-05-062.

[8] D.97-03-021.

Pacific compromised customer service when it tried to sell more expensive services before even mentioning less expensive services.[9]

- Also in 2001, the Commission found that the large increase in Pacific's repair intervals to restore dial tone service violated the Public Utilities Code.[10]
- And just last year, the Commission levied against Pacific the largest fine ever paid by a public utility, $27 million for overbilling for DSL charges.[11]

These decisions are the epitome of relevant evidence -- adjudicated PUC findings regarding Pacific's service quality in a variety of areas that run the entire gamut of the NRF period. It is beyond question that they are highly relevant to our evaluation of how Pacific's service quality has fared during the NRF period. The majority decision's overall conclusion that Pacific provided "generally good" service cannot be squared with these decisions finding an array of serious service quality problems throughout the NRF period.[12]

The majority decision appears to view these eight decisions as just eight more data points in a record filled with several hundred data points from GO

[9] D.01-09-058, as modified by D.02-02-027.

[10] D.01-12-021.

[11] D.02-10-073.

[12] It is notable that the majority decision supports its summarized findings regarding the quality of Pacific's and Verizon's services in I.A through D without referring to any of the Commission's adjudicated decisions regarding service quality. When the decision obliquely alludes to those decisions in Section 1.E, it states that they are "more difficult to interpret quantitatively" and characterizes them as mere "lapses in service quality or marketing standards." Majority decision at 8. Clearly, the adjudicated decisions are viewed as outliers and not incorporated into the analysis that supports the majority's conclusions.

133-B and ARMIS performance over the years. The majority decision says that "it is not possible to draw a statistical conclusion" because there are "so few" enforcement decisions.[13] However, it is patently wrong to treat each of these adjudicated decisions as akin to a particular data point. Under the majority's faulty reasoning, each of these Commission decisions is of no greater value to the record than a point on a graph that shows, for example, how long it took Pacific to restore service outages in 1994. Unlike points on a graph, these are fully litigated Commission decisions, each adopting ultimate conclusions based on an analysis in most cases of an extensive evidentiary record with considerable service quality data. Rather than downplaying their significance, one would expect this Commission to give its own decisions preeminent weight in assessing the utilities'service quality.

The majority decision focuses on the issue of whether NRF caused an increase in service quality decisions adverse to Pacific. I agree with the majority's conclusion that the record does not permit us to find that NRF caused an increase in such decisions. However, it is equally true that the record does not allow us to rule out the possibility that NRF in fact contributed to at least some of the problems recounted in these decisions. In fact, as noted above, in two of the decisions, the Commission assigned some of the blame for the problems to utility incentives to cut costs.[14] The correct conclusion is that the record does not allow

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[13] Majority at 152.

[14] In D.93-05-062, the Commission found that Pacific did not fix its botched payment processing system because of the company's aversion to incurring increased costs. (49 CPUC 2d 299, 309). In D.97-03-021, the Commission found that limited staffing that prevented Pacific from addressing its problems in providing ISDN service. (71 CPUC 2d 249, 263).

us to make a finding one way or the other regarding NRF's impact on the number and magnitude of decisions finding service quality deficiencies or violations.

In any event, whether or not NRF affected the number of decisions finding service quality problems, the majority decision errs in losing sight of the larger issue of what these decisions tell us about the quality of service offered by Pacific during the NRF period. The majority makes a fundamental error in not considering these decisions in formulating its overall conclusions about how service quality has fared under NRF.

III. The Majority Decision Places Excessive Weight on Statistically Suspect Comparisons of Pacific's and Verizon's Service Quality Data to Other Carriers

The majority decision places considerable weight on what is referred to as the "reference group" analysis, a comparison of the utilities' ARMIS results with those of other large carriers. The majority states that it is "reasonable to conclude that a utility that earns better scores on ARMIS service quality measures than the scores of a reference group that includes the major large utilities is providing good service quality."[15] I strongly disagree with the assertion that we can find that a carrier's service quality is good just because that carrier's service quality data come out better than the average of its peers. I disagree as a general matter, and even more so because of the record here showing the unreliability of such comparisons.

As a general matter, it is poor policy to let the average performance of the utility industry define what is good or not good service quality. Such an

[15] Majority at 234, Conclusion of Law (COL) 22.

approach cedes our regulatory authority to the utilities. We forsake our responsibility to residential and business customers if we fail to set our own standards for acceptable service quality that is based on the level of service that is reasonable to expect, which is not necessarily the average service the utilities actually provide.[16]

As a practical matter, the reference group analysis should have been accorded little weight because both the record here and the conclusion of a recent Commission decision show that comparisons of ARMIS data among carriers are unreliable. Even the proponent of the reference group comparison, Pacific's witness Dr. Hauser, does not dispute that there are serious questions about the comparability of ARMIS data among carriers. Dr. Hauser states:

> Although general rules cover how ARMIS data are reported, these rules do not require each LEC to collect or process its data using a uniform methodology. Therefore, comparisons of Pacific's ARMIS measures with other LECs can be difficult to interpret because of the variations in data methodologies across LECs.[17]

Dr. Hauser goes on to note that changes by individual carriers in their data methodologies over time can also render the comparisons "difficult to interpret." (*Id.*; *see also id.* at 22).

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[16] I recognize that, lamentably, this Commission has not yet set standards for many of the ARMIS measures. In light of this fact, the reference group analysis provides data that is of some, albeit limited, use to the record. However, the majority needlessly uses the reference group data to arrive at the labels of "very good" and "good" for Verizon and Pacific. As explained below, there is no need to apply such sound bite labels to this complex record.

[17] Ex. 2B: 354 at 20.

Precisely because of the differences in collecting and processing service quality data among carriers, we recently agreed with Pacific (and disagreed with ORA) that ARMIS data are not comparable among different carriers:

> ORA attempts to compare Pacific's ARMIS data with that reported by other carriers to show that Pacific's repair intervals are generally longer than those of any other carrier. Pacific points out that its data are not comparable to the other data for other companies because the processes used by the companies to issue trouble reports differ, which affects the out-of-service intervals. We concur with Pacific that it is not possible to make meaningful comparisons between Pacific and other carriers using ARMIS data.[18].

Here, where the utilities have urged us to change position and rely upon the inter-company comparison, the majority does so. In fact, the majority now finds probative the exact same comparison of ARMIS repair intervals that the Commission found useless less than two years ago. The majority decision fails to explain successfully why the data gathering differences that were determinative in our 2001 decision are no longer important in this decision.[19]

In another part of the decision, where customer survey findings are reviewed, the majority again fails to acknowledge serious problems in comparative data upon which the majority relies. Pacific provided customer survey results (referred to as the Market Insights surveys) and compared those

[18] D.01-12-021, *mimeo* at 17, fn. 17.

[19] The majority speculates that averaging the comparative data over a number of companies and a number of measures can be expected to "cancel out the differences in operating procedures among carriers". (p. 187). However, the majority does not explain why this is a reasonable expectation. The record is completely devoid of any information about the nature of the differences in record-keeping among the carriers, so there is no way to know whether some carriers, including Pacific and Verizon, systematically track their results in ways that consistently make their performance appear better than similar performance by the other utilities.

results with average survey results of the top ten local exchange carriers (LECs).[20] The majority adopts Pacific's testimony as its findings, almost verbatim. Finding of Fact (FOF) 285 finds that Pacific's customers in the 1998 to 2001 period were "three to six percentage points less dissatisfied than the average of the top ten LECs."[21] FOF 286 finds that Pacific's dissatisfaction levels declined over the 1998 to 2001 period, contrary to the general trend of the top ten LECs.[22] However, the majority fails even to mention the obvious shortcomings of these inter-company survey comparisons. Each carrier had the discretion to conduct its surveys as it saw fit with no prescribed uniform methodology, questions or response scales. Carriers also had the discretion to change surveys over time without posting notice of those changes.[23] As a result, surveys with completely different questions, sample sizes, and survey techniques are being compared. Even Pacific's witness conceded that the comparisons are "potentially biased."[24] The non-comparability of these surveys completely undermines the validity of the inter-company comparisons, yet the majority does not even note the problem. When these problems are properly considered, FOFs 285 and 286 are wholly unsupportable.[25]

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[20] Majority at 133.

[21] Majority at 227.

[22] *Id.*

[23] Exh. 2B:354 at 37:1-9 (Hauser Direct Testimony).

[24] *Id.*

[25] These unsupportable findings appear to color the majority's analysis of Pacific's overall performance. The majority summarizes Pacific's surveys as yielding a "principal finding of customer satisfaction" and, in the next paragraph "a record of

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In sharp contrast, the majority adopts a highly cautious approach to the survey data proffered by ORA. ORA conducted the exact same survey of a sample of Pacific's customers in 1995 and 2001, using the same methodology in both years. The findings indicate that customers had a less favorable perception of Pacific's service quality in 2001 than in 1995. The majority reports this finding but expresses concern about the low response rate to the survey in 2001, concluding that the drop in the response rate "limits our ability to draw conclusions from the survey with statistical confidence."[26] Apparently, in the overall analysis, the majority gave little if any weight to ORA's survey findings, since the majority believed that "[c]ustomers are generally pleased with service quality,"[27] a finding at odds with ORA's survey results.

My objection is not to the majority's cautious approach in reviewing ORA's survey results, but to the abandonment of such caution when reviewing Pacific's survey comparisons. If ORA's comparisons of the same surveys using the same methodology are entitled to little weight, then consistency demands that we reject Pacific's attempted comparisons between entirely different surveys using entirely different methodologies. Without explanation, the majority applied a tough standard of "statistical confidence" to ORA's survey comparisons, but failed to apply any standard to Pacific's survey comparisons.

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strong customer satisfaction." (Majority at 137). The majority states that these findings are consistent with the conclusions it draws from the ARMIS and GO 133-B measures – that "Pacific's overall performance is good." (*Id.*)

[26] Majority at 124.

[27] Majority at 8.

IV. The Majority's Conclusion that NRF Did Not Cause a Diminution in Service Quality Lacks Support in the Record

The majority decision ventures the conclusion that NRF did not cause a decline in service quality.[28] It reaches this conclusion despite the following facts: 1) there is no evidence in the record of service quality data prior to the NRF period; and 2) there is no evidence in the record even suggesting what the performance of these utilities would have been under a different form of regulation. (For instance, there is no evidence comparing the performance of these NRF utilities to utilities that do not operate under a scheme of NRF-type incentive regulation.) As a result, it is simply not possible based on this record to isolate the impact of NRF regulation on service quality. We have no way of knowing whether service quality would have been better, worse, or the same under a different form of regulation. We cannot even answer the basic question of how the GO 133-B and ARMIS results for the NRF period compare to pre-NRF results.[29]

As supposed proof that NRF did not cause a decline in service quality, the majority points to linear trends[30] showing statistically significant improvement

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[28] Majority at 7.

[29] The record does not answer this question in part because much of this data did not exist prior to the NRF period and, in part, because the focus of this phase was on how service quality fared during the NRF period. The focus was not the very difficult task of attempting to establish whether NRF caused or did not cause service quality declines or improvements.

[30] It is important to understand the limitations of a linear trend analysis, which attempts to connect a straight line through the data points. Such an analysis does not identify trends where, as is the case with Pacific's out-of-service repair intervals, there is a period of steady deterioration of service followed by nearly equivalent improvements

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for certain measures and the fact that improving trends outnumber deteriorating trends.[31] These trends tell us nothing about the impact of NRF on service quality. By definition, an improving trend means that performance was weaker in the early part of the NRF period[32] and then improved toward the latter part of the NRF period. For the reasons stated in the previous paragraph, the record gives no indication whether the weaker performance in the early part of NRF was attributable to NRF or independent of NRF. Because we cannot rule out the possibility that the relatively weak service quality early in the NRF period was caused by NRF, the improvement that the majority relies upon may actually show that NRF caused a decline in service quality in the early years, a result fully at odds with the majority's conclusion. (I am not asserting that this is the case, just that the majority cannot rule it out.) Similarly, in light of the previously noted gaps in the record, it is possible that the improvements in performance later in the NRF period have nothing to do with NRF regulation. They may instead reflect the Commission's increased efforts to enforce our service quality

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in service. From the limited perspective of a linear trend analysis, this pattern is of no statistical significance. However, in the years of deteriorating service, customers were forced to endure increasingly slow repair intervals, followed by "improvement" only to the level that customers experienced at the beginning of the period under measurement.

[31] Majority at 5-7.

[32] It is notable that for many measures, the available data begins well into the NRF period: 1992 for business office answer time; 1993 for directory assistance and toll operator answer times; and 1994 for out-of service trouble reports (2 measures), other trouble reports (2 measures), repair intervals (4 measures), and installation intervals.

requirements backed up by threats of penalties and the actual imposition of penalties in certain cases.[33]

In sum, the majority's conclusion that NRF did not cause a reduction in service quality is not supported by the record. Trends reveal nothing about the impact of NRF unless we know what level of service was provided prior to NRF or know what level of service would have been provided under a different regulatory scheme. In the absence of such data, the majority is simply speculating.

V. Conclusion

In large part because of the problems identified above, the majority decision reaches sweeping and unsupportable conclusions that give the utilities a clean bill of health. Such sweeping conclusions are particularly inconsistent with the record regarding Pacific. As the 236 page text of this decision attests, the record here is complex and shows a wide range of performance that varies by year, by measure, by type of customer served, and by utility. The majority synthesizes all of this evidence into an overarching conclusion that this record

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[33] See the six decisions against Pacific issued from 1997 on that are listed on pages 149-150 of the majority decision and the 1998 decision against Verizon noted on page 154. An analysis similar to this paragraph could be done to show that the measures for which there is no statistically significant trend of decline or improvement are not probative evidence of the majority's proposition. Again, the fundamental problem is that the record does not inform us whether the data for these measures would have been better under a different form of regulation or even whether these results are better than those in pre-NRF years. In addition, for some of the measures that fail to show a *linear* trend, such as the four measures of Pacific's out-of-service repair intervals, there is a clear pattern of a significant deterioration of service in the first few years for which we have data, which undermines the assertion that NRF did not cause a decline in service quality.

shows "overall high service quality".[34] The majority finds that Pacific's "overall performance is good."[35]

These determinations cannot be reconciled with Pacific's serious service quality problems during the NRF years. The eight previously mentioned decisions[36] find major service quality violations and deficiencies in areas such as repair service, answer time for customer calls, DSL service, ISDN service, timely payment processing, and general marketing practices. Similarly, the GO 133-B data point to major problems in much of the NRF period for Pacific in meeting answer time standards for repair service and general business office services. Furthermore, the ARMIS data show that Pacific's repair intervals doubled from 24 to 48 hours from 1994 to 1998 and that Pacific's levels of residential trouble reports regarding static and interrupted calls have worsened over the NRF period. Timely repairs and timely access to a customer service representative are cornerstones of good customer service. Pacific's significant problems in these areas (as well as DSL, ISDN, payment processing and marketing practices) during much of the NRF period do not permit the conclusion that Pacific's overall performance was good.

Verizon's superior performance to Pacific[37] does not justify a conclusion that these utilities provided "overall high service quality." In light of the fact

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[34] Majority at 7. Later on the same page, the majority characterizes the record as showing service quality under NRF that was "good and improving." *Id.*

[35] Majority at 137.

[36] *See* Section II above.

[37] Verizon had two decisions finding service quality violations or deficiencies during the NRF period (compared to Pacific's eight) and had more ARMIS and GO 133-B measures

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that Pacific serves 73% of residential lines and 70% of business lines in California,[38] Pacific's performance should be weighed more heavily in any attempt to assign a label to the entire record.[39] In addition, as noted above, Verizon also had its problems (albeit fewer than Pacific) – primarily in the areas of answer times, installation intervals, and switch downtime.

It was not necessary to pin any sweeping labels on the entirety of this complex record. Along with Commissioner Wood, I offered an alternate decision that avoided overly generalized conclusions. Our alternate laid out the data, identified the trends disclosed through the statistical tests, noted the results of the reference group analysis (but cautioned that those results were entitled to limited weight) and summarized the findings in a way that did not ignore or obscure important information in the record.

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showing a linear trend of improvement than Pacific. In addition, Verizon showed improvements for both residential and business customers whereas Pacific's improvements were limited to business customers. However, Verizon had a four-year period in which residential installation intervals more than doubled and business installation intervals almost doubled. Verizon also had a major jump in switch downtime from 1999 to 2001 and failed to meet repair and business office answer time standards in many months (but not as many as Pacific).

[38] California Public Utilities Commission, *The Status of Telecommunications Competition in California*, Report for the Year 2003, October 31, 2003, pp. 16 and 17. The residential figure is derived by multiplying SBC's (i.e, Pacific's) 78% market share among ILECs by the ILECs' combined 94% share of the local market. The business figure is derived by multiplying SBC's 83.1market share among ILECs by the ILECs' combined 84.7% share of the local market.

[39] However, as noted below, the wiser course would have been simply to state the facts in the record without attempting an unnecessary ultimate conclusion about the entirety of the record.

In giving Pacific a clean bill of health for its performance over the NRF period thus far, the majority lowers the bar on the Commission's service quality standards. Our mandate from the legislature is to promote "high quality telecommunications service to all Californians."[40] The majority decision undermines that mandate by sending the message that the Commission does not consider major service quality shortcomings over the NRF period to be significant in an overall assessment of the record. Utilities will not be deterred from providing deficient service if the Commission issues decisions such as these that pronounce service to be good despite a long record of major problems.

Finally, the majority sends a dangerous message about employment levels at our utilities. Both utilities have eliminated many jobs during the NRF period. It is a credit to the hard work and dedication of the remaining employees of both companies that there were not more service quality problems. The record shows that Pacific embarked on a major program of staff reductions in the early years of NRF, when Pacific's problems with answer times were most acute and when Pacific's repair service problems took root. Pacific is now in the midst of further major staff reductions, which have prompted the Commission to open an investigation to examine the impacts of those reductions on customer service.[41] The majority's lenient approach to assessing utility service quality in this decision undermines the need to ensure that utilities have sufficient staffing levels in order to provide high quality service.

For all the above reasons, I dissent.

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[40] Public Utilities Code Section 709(a)

[41] I.02-11-008.

Dated October 30, 2003, San Francisco, California.

/s/ LORETTA M. LYNCH
LORETTA M. LYNCH
Commissioner